

(2) Either party may file a motion for representative disqualification at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept.

(6) Given the Department's need to maintain an exceptionally high degree of order and discipline in the workplace, an arbitrator, adjudicating official, or MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When

a penalty is mitigated, the maximum justifiable penalty must be applied.

(7) An initial decision must be made no later than 90 days after the date on which the appeal is filed. If that initial decision is appealed to MSPB, MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review.

(8) If the Director seeks reconsideration of a final MSPB order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration. MSPB must state the reasons for its decision so that the Director can determine whether to seek judicial review and to facilitate expeditious judicial review.

(9) MSPB, in conjunction with the Department and OPM, will develop and issue voluntary expedited appeals procedures for Department cases.

(1) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7) and (k)(8) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(m) Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision is as prescribed under 5 U.S.C. 7703.

**§9701.707 Appeals of mandatory removal actions.**

(a) *General.* Appeals of mandatory removal actions are governed by procedures set forth in this section. An employee may appeal such actions to the Mandatory Removal Panel (MRP) established under §9701.708.

(b) *Procedures.* (1) The MRP will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, consistent with the requirements set forth in §9701.706(k), as applicable, and for such other matters as may be necessary to ensure the operation of the MRP.

(2) The MRP will conduct a hearing, for which a transcript will be kept, to resolve any factual disputes and other relevant matters. All members will hear a particular appeal and will decide it based on a majority vote of the members. If only two members are

serving, the vote of the Chair will be dispositive in the event of a tie.

(3) The appellant has the right to be represented by an attorney or other representative.

(4) The only action available to the MRP is to sustain or overturn a mandatory removal. The MRP does not have authority to mitigate the penalty. Only the Secretary may mitigate the penalty in these cases after the MRP has rendered its decision.

(5) The decision of the Department must be sustained if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) Harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(6)(i) Except as provided in paragraph (b)(6)(ii) of this section or as otherwise provided by law, the MRP may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Panel reviewing the initial appeal determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in §706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(7) The MRP must issue a written decision (including dissenting opinions, where appropriate) in each case and serve each party and OPM with a copy. These decisions are final and binding.

(8) Failure of the MRP to meet applicable deadlines imposed under §9701.706(k) in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(c) *MSPB review.* (1) In order to obtain judicial review of an MRP decision, an employee, the Department, or OPM must request a review of the record of an MRP decision by MSPB by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after MSPB's receipt of the request for a review of the record, any response or OPM intervention must be filed. A party, or OPM, may each submit, and MSPB may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. MSPB will establish, in conjunction with the MRP, standards for the sufficiency of the record and other procedures, including notice to the parties and OPM. MSPB must accept the findings of fact and interpretations of this part made by the MRP and sustain the MRP's decision unless the employee shows that the MRP's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) MSPB must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review or OPM's intervention brief, whichever is filed later. This 30-day time limit is mandatory, except that MSPB may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (c)(2) of this section is permitted.

(4) If MSPB does not issue a final decision within the mandatory time limit established by paragraph (c) of this section, MSPB will be considered to have denied the request for review of the MRP's decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703.

(d) *Subsequent action.* (1) If either the MRP or MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action (other than an MRO) based on the same record evidence. Such a proposal must be issued—

(i) In accordance with applicable law and regulation, including the procedures set forth in § 9701.609; and

(ii) Normally within 15 days after the date of MSPB's decision, unless the Department establishes good cause for exceeding this time limit.

(2) Nothing in this section precludes the Department from taking a subsequent action against an employee based, in part, on additional evidence that was not part of the record in the initial proceeding before the MRP.

(e) *Judicial review.* Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision on an MRO is as prescribed under 5 U.S.C. 7703.

(f) *OPM intervention.* (1) The Director may, as a matter of right at any time in the proceeding before the MRP or MSPB, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(2) Except as provided in § 9701.709, any decision under paragraph (c) of this section is final unless the Director petitions MSPB for review within 30 days after receipt of the decision. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) *Appeal rights of retirees.* If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

#### § 9701.708 Mandatory Removal Panel.

(a) *Composition.* (1) The Mandatory Review Panel is a standing panel composed of three members who will be appointed by the Secretary for terms of 3 years, except that the appointments of the initial MRP members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for an additional term.

(2) Members of the MRP must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in either labor or employee relations or law enforcement/homeland security matters. At least one member of the Board must have experience in labor relations. Members may be removed by the Secretary on the same grounds as an MSPB member.

(3) An individual chosen to fill a vacancy on the MRP will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the MRP.

(c) *Appointment procedures for non-Chair MRP members.* (1) The appointments of the two non-Chair MRP members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint MRP members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.